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The sentencing of "couriers" under section 33B of the Misuse of Drugs Act: PP v Chum Tat Suan [2014] SGCA 59

Benjamin Joshua ONG
Singapore Management University, benjaminjong@smu.edu.sg

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The sentencing of "couriers" under section 33B of the Misuse of Drugs Act*

***Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59**

BENJAMIN JOSHUA ONG†

The issues

Sections 33B(1)–(2) of the Misuse of Drugs Act ("the Act")[1] allow for a person who commits an offence under ss 5(1) or 7 of the Act to be sentenced to life imprisonment and caning instead of death if two conditions are met:

1. Section 33B(2)(*a*): "his involvement in the offence under section 5(1) or 7 was restricted (i) to transporting, sending or delivering a controlled drug; (ii) to offering to transport, send or deliver a controlled drug; (iii) to doing or offering to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or (iv) to any combination of activities in sub-paragraphs (i), (ii) and (iii)".

   For brevity, persons who meet these criteria will be referred to as "couriers" and the claim that one meets them will be referred to as the "Courier Plea". However, it must be stressed that this phrase is only *shorthand* used in Parliament and subsequently by the Courts to refer to the criteria in s 33B(2)(*a*). The word "courier" is *not* part of the law: it appears nowhere in the Act.[2]

2. Section 33B(2)(*b*): the Public Prosecutor has certified that he has "substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore". This is not the focus of this commentary.

* The author is grateful to the anonymous reviewer for her feedback on an earlier draft. All errors and omissions remain his own.
† BA (Hons) (1st Class) Jurisprudence (Oxon); currently reading for the BCL (Oxon).
[1] Cap 185, 2008 Rev Ed.
[2] *Public Prosecutor v Chum Tat Suan* [2014] 1 SLR 336 (HC) at [3].

The issues before the court were:

1. If an accused person like Chum Tat Suan, who had claimed at trial that he did not know that what he was carrying was drugs,[3] but was then found guilty, wishes to give additional evidence at the sentencing stage in order to raise the Courier Plea, should he be able to do so; and what if, in doing so, he contradicts his evidence at trial ("Question 2")?

2. May a person who was involved in repacking drugs raise the Courier Plea ("Question 3")?

Judgment at first instance

At first instance, Choo Han Teck J declined to hear additional evidence for fear that it may undermine the evidence that led to the findings of fact supporting the conviction. Therefore, Choo J "g[a]ve the benefit of the doubt to the accused" and held that he was a courier, without going into detailed analysis of the evidence. He rejected the proposition that the accused should not be forced to "take a position and stick with it" from the trial to the sentencing phase.[4]

Answers to criminal references by the Court of Appeal

In response to Question 2, Chao Hick Tin JA held that the accused may adduce additional evidence to raise the Courier Plea after conviction, even if he would end up contradicting his earlier evidence at trial.[5] No rule prohibited this; moreover, "every offender [must] be, as far as possible, sentenced on the basis of accurate facts".[6]

Woo Bih Li and Tay Yong Kwang JJ apparently disagreed: they thought that Chao JA's approach would "give the accused person a chance to deliberately stifle evidence to gain an advantage and then to speak the truth when that strategy fails", which would be "changing the trial process".[7]

In response to Question 3, the Court of Appeal held unanimously that the Courier Plea is not available to "those whose involvement with drugs extends beyond that of transporting, sending or delivering the drugs... [even if] the accused person's involvement is of an ancillary nature".[8] This included repacking of drugs. Somewhat confusingly, however, the Court agreed[9] with Tay J in *Abdul Haleem* that "the mere incidental act of storage or safe-keeping

[3] *Public Prosecutor v Chum Tat Suan* [2013] SGHC 150 at [6]–[7].
[4] *Public Prosecutor v Chum Tat Suan* [2014] 1 SLR 336 (HC) at [3].
[5] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [38].
[6] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [41]–[42].
[7] Public Prosecutor v Chum Tat Suan and another [2014] SGCA 59 at [81]–[82].
[8] Public Prosecutor v Chum Tat Suan and another [2014] SGCA 59 at [66].
[9] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [67].

by the accused person in the course of transporting, sending or delivering the drugs, should not take him outside of the definition of a courier."[10]

For completeness, it should be noted that the Court dismissed Question 1 – "[w]hether [the accused] bears the burden of proving on a balance of probabilities that he satisfies the requirements under ss 33B(2)(*a*) and 33B(3)(*a*)" – as a "non-starter" which "need not have been raised".[11] This question appears to have been a response to Choo J's remark at first instance in refusing to have the accused adduce new evidence after conviction that "this new requirement in law needs to be settled before we impose the burden of proving that aspect on the accused at the level of proof on a balance of probabilities".[12] With respect, it appears that what Choo J meant was that he was applying an evidential presumption in favour of the accused, not that he was lowering the standard of proof.

Let us comment on Question 3 followed by Question 2.

Commentary on Question 3: What is the scope of the Courier Plea?

Section 7 offences

Insofar as s 7 is concerned, it is submitted that the Courier Plea will *always* be available. The offence under s 7 is that of "import[ing]" or "export[ing]" drugs. "Import" and "export" respectively mean to "bring or cause to be brought into Singapore" and to "take or cause to be taken out of Singapore" by "land, sea or air".[13] Section 33B(2)(*a*) states that the defence is available if the accused's "*involvement in the offence*... was restricted to (i) transporting, sending or delivering a controlled drug [etc.]" (emphasis added). Therefore, even if the accused also commits acts other than transporting, sending, or delivering, such acts will be irrelevant as they have nothing to do with the accused's involvement in the *s 7 offence*.

One might then ask why Parliament included s 7 offences in the scope of s 33B, rather than just amending the sentences in the Second Schedule. As a preliminary point, it is clear from *Hansard* that the inclusion of both s 7 and s 5(1) offences in s 33B is not a mere accident of drafting: the Minister for Home Affairs, Mr Teo Chee Hean ("the Minister"), who introduced the Bill that created s 33B, distinguished clearly between "drug trafficking" (s 5(1)) and "drug importation or exportation" (s 7).[14]

A plausible explanation is that this expands the scope of prosecutorial discretion. Previously, the prosecution could constrain the court's sentencing options by exercising two dimensions of discretion: what offence to charge the accused with (s 5(1) or s 7) and what quantity of drugs to mention in the charge (which can be different from the quantity which the accused *factually* handled). Thus, if somebody were to bring more than 15 g of diamorphine into

[10] *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 (HC) at [55].
[11] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [19].
[12] *Public Prosecutor v Chum Tat Suan* [2014] 1 SLR 336 (HC) at [7].
[13] Interpretation Act (Cap 1, 2002 Rev Ed) s 2.
[14] *Singapore Parliamentary Debates, Official Report*, vol 89 (12 November 2012, 3.22 pm).

Singapore, the options available to the prosecution, which would affect what sentence he might receive, are as follows:

Option	Charge brought by the prosecution	Possible sentence imposed by the court[15]
Option 1	s 5(1) – trafficking in less than 10 g of diamorphine	5–20 years imprisonment and 5-15 strokes of the cane
Option 2	s 7 – importing less than 10 g of diamorphine	5–30 years imprisonment and 5-15 strokes the cane
Option 3	s 5(1) – trafficking in 10–15 g of diamorphine	20–30 years imprisonment and 15 strokes of the cane
Option 4	s 7 – importing 10–15 g of diamorphine	20–30 years imprisonment and 15 strokes of the cane
Option 5	s 5(1) – trafficking in more than 15 g of diamorphine	Death
Option 6	s 7 – importing more than 15 g of diamorphine	Death

To achieve its intended aims, Parliament chose to introduce two more options through s 33B:

Option 7	s 5(1) – trafficking in more than 15 g of diamorphine; *and* AG chooses to issue certificate (assuming the courier plea is also available)	Life imprisonment and 15 or more strokes of the cane
Option 8	s 7 – importing more than 15 g of diamorphine; *and* AG chooses to issue certificate (assuming the courier plea is also available)	Life imprisonment and 15 or more strokes of the cane

Alternatively, Parliament *could* have chosen to introduce Option 7 but abolished s 7, such that all charges must be brought under s 5(1). But this would have eliminated the distinction between Options 1 and 2 and eliminated the possibility of making future amendments of the Act so as to introduce differences in sentencing ranges between Options 3 and 4; between Options 5 and 6; and between Options 7 and 8.

Another alternative is that Parliament *could* simply have amended Option 6 to have a sentence of either life imprisonment and caning or death, rather than mandatory death. But this would have eliminated the possibility of a distinction between Options 6 and 8.

Therefore, the reason why s 33B was drafted the way it was, and in particular why it covers s 7 offences, appears to be that Parliament wished to give the prosecution two *additional* options on how to exercise its discretion, *while preserving all of the existing six options*. It can exercise these new options by exercising a new third dimension of discretion: discretion as to whether or not to make the certificate of substantive assistance available. The upshot is

[15] Misuse of Drugs Act (Cap 185, 2008 Rev Ed) Second Schedule. Note that diamorphine is a Class A drug: Misuse of Drugs Act Cap 185, 2008 Rev Ed) First Schedule.

that, in s 7 cases, the Courier Plea is always available and the application of s 33B turns solely on the certificate of substantive assistance.

It is therefore respectfully submitted that the Court's answer to Question 3 that "if the person convicted has been found to have the intent to sell the controlled drugs, then he is evidently not merely a courier"[16] should *not* apply to s 7 cases. In s 7 cases, such as *Chum Tat Suan* itself, intent to sell is simply irrelevant *to the courts* (instead, it is *at most* relevant to the Prosecution in deciding between Options 6 and 8); however, for the reasons above, this interpretation does not render the inclusion of s 7 offences in s 33B otiose.

Though details are outside the scope of this comment, the introduction of this third dimension of discretion brings to the fore the interesting, long-standing constitutional question of exactly how wide prosecutorial discretion can properly be. It has been said (albeit in *different* contexts) that "the Legislature has the power to prescribe punishments of any kind for a defined offence",[17] and that "the judiciary does not possess the power or jurisdiction to formulate or prefer charges against accused persons; that is the constitutional provenance of the Attorney-General".[18] But do these *dicta* apply in our present context to similar effect (if s 33B or its application were to be challenged under Art 93 of the Constitution); or, alternatively, is judicial review available on other grounds, given that "[p]rosecutorial discretion is wide but not unfettered"?[19] The issue is now before the Court of Appeal.[20]

Section 5(1) offences and the act of repacking drugs

As for s 5(1), the offence is "traffic[king]" or doing "any act preparatory to or for the purpose of trafficking", or offering to do the same. To "traffic" means "to sell, give, administer, transport, send, deliver or distribute",[21] or to offer to do the same. Hence, it is possible for someone to commit an offence under s 5(1) and not have the Courier Plea open to him. Does this apply to persons who have "transported, sent, or delivered" drugs who have also repacked drugs?

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[16] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [62].
[17] *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 (HC) at [44], albeit in the different context of mandatory minimum sentencing for repeat drug consumers.
[18] *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 (CA) at [29], albeit in the different context of co-accused persons facing different charges.
[19] Gary Chan Kok Yew, 'Prosecutorial discretion and the legal limits in Singapore' (2013) 25 SAcLJ 15 at para 69, available at http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/623/%282013%29%2025%20SAcLJ%2015-50%20%28Gary%20Chan%29.pdf. See also Chen Siyuan, "The limits on prosecutorial discretion in Singapore: Past, present, and future" (2013) *International Review of Law* 5, available at http://dx.doi.org/10.5339/irl.2013.5.
[20] In *Ridzuan*, one appellant (Ridzuan) sought an order that the Public Prosecutor reconsider his decision not to issue a certificate of substantive assistance. A five-judge Court of Appeal was specially convened to hear this case (K.C. Vijayan, "5-judge Court of Appeal to hear trafficker's case", *The Straits Times*, 16 February 2014), but it ultimately held that the correct procedure to seek such an order was by way of an application for judicial review beginning in the High Court: *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 (CA) at [102]. The High Court dismissed the application (*Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 (HC)); according to the editorial note in the Singapore Law Reports (at 776), the appeal against this decision (Civil Appeal No 131 of 2014) is scheduled to be heard in March 2015.
[21] Misuse of Drugs Act (Cap 185, 2008 Rev Ed) s 2.

The Court of Appeal said that the answer was no: from an exchange in Parliament between Mrs Lina Chiam and the Minister to the effect that persons who have "participated in acts such as packing, storing or safekeeping" drugs "are not couriers",[22] the Court surmised that the "caveat [that is s 33B] has to be construed strictly. Acts necessary for transporting, sending or delivering the drugs cannot include packing, for instance, as packing is not a necessary element of moving an object from one point to another. Simply put, a courier is someone who receives the drugs and transmits them in exactly the same form in which they were received without any alteration or adulteration."[23] With respect, this is not strictly correct, for four reasons.

Reason 1, based on the text of s 33B

First, the Act clearly *does* contemplate that the defence may be available to someone who performs acts other than moving the drugs: s 33B(2)(*a*)(iv) makes the defence available not only to a person who "transport[s], send[s] or deliver[s] a controlled drug" (s 33B(2)(*a*)(i)), but also to one who performs a "combination" of these acts with other acts such as "doing or offering to do any act preparatory to or for the purpose of... transporting, sending or delivering a controlled drug" (s 33B(2)(*a*)(iii)).

Reason 2, based on case law

Second, the idea that the defence is only available to those who performed acts "necessary" for "moving an object from one point to another" contradicts other authority, including Court of Appeal authority. It appears to originate from Tay J's judgment in *Abdul Haleem*, where the accused persons had "intended to keep the bundles of drugs for at least a short period of time before delivering or sending the bundles", but Tay J held that this was inconsequential.

Chao JA appears to have thought that it was inconsequential because "keeping" something for some time is "necessary" for "moving [it] for one point to another". But Tay J did not say that doing so was *necessary* for transporting (although it is); he said that it is "*incidental*" to transporting. It is notable that Tay J also thought it inconsequential, and thus seemingly incidental, that Abdul Haleem himself had "repackaged [the drugs] for sale".[24] The word "incidental" does not appear in the Act, but may, in line with *Reason 1* above, be equated with (to quote s 33B(2)(*a*)(iii)) "preparatory to or for the purpose of his transporting, sending, or delivering a controlled drug".

Moreover, in *Ridzuan*[25] (a case involving Abdul Haleem's co-accused), the Court of Appeal (whose members included Chao JA and Woo J) unanimously explicitly acknowledged that the accused was involved in repacking drugs,[26] yet *did not* overturn the High Court's finding

[22] *Singapore Parliamentary Debates, Official Report*, vol 89 (14 November 2012), 45–46, cited *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [63].
[23] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [68].
[24] *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 (HC) at [12], [15], [17].
[25] *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 (CA).
[26] *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 (CA) at [11].

that Ridzuan satisfied the s 33B(2)(*a*) requirements.[27] In fact, Ridzuan had done even more than repacking – "he had been instrumental in putting Abdul Haleem in actual physical possession of the additional bundles" by arranging for Abdul Haleem to pick up the drugs from a third person (one Gemuk)[28] – yet even this ostensibly managerial role was not enough to render him more than a courier in the eyes of the Court of Appeal.

How may this be explained? One might argue that by "ancillary acts" the court meant acts in *addition to* couriering, while by "incidental acts" the court meant acts which are a *necessary integral part* of the couriering process. But the decisions in *Abdul Haleem* and *Ridzuan* regarding repacking illustrate how unstable this distinction is: packing might be part of the courier process if the courier's job is to deliver drugs to a distributor or a customer (as was Abdul Haleem's and Ridzuan's job), or it might not be if the courier's job is merely to deliver them to another courier (as was the job of the "jockey" who delivered the "ball" of heroin to Abdul Haleem and Ridzuan).

Reason 3, based on charges brought by the prosecution

Moreover the distinction in the previous paragraph will often not be necessary to draw: as *Abdul Haleem* and *Ridzuan* illustrate, it is possible that "the offence" referred to in s 33B(2)(*a*) is framed such that it has nothing to do with packing *at all*. Abdul Haleem had been charged that he "did traffic in a controlled drug... to wit, by *having [the drugs] in [his] possession* for the purpose of trafficking... and [he had] thereby committed an offence under s 5(1)(*a*) read with section 5(2) of the Misuse of Drugs Act"[29] (emphasis added). There was no reference to acts committed before he was found *possessing* the drugs.

Reason 4, based on *Hansard* read with the text of s 33B

Fourth, with respect, the extract from *Hansard* cited by the Court is not unequivocal. When Mrs Chiam referred to "offenders who are found to have participated in acts such as packing, storing or safekeeping drugs", she was repeating the *first* question she raised in her speech the previous day, which appears to refer to "offenders" in the *general* sense of those involved in drug-related activities.[30] She was contrasting persons involved in "packing, storing, or safe-keeping" with those involved in "transporting, sending, or delivering" and arguing that the former's "culpability may be similar to" the latter. By the former, she may have meant drug warehouse operators or those who re-pack drugs in a manner more than "preparatory to or for the purpose of... his transporting, sending or delivering" drugs (to quote s 33B(2)(*a*)(iii)). This may include persons who are involved in manufacture of drugs or management and co-ordination activities, but who are nonetheless not "drug lords". This would explain the Minister's reply that "[t]hey are not couriers":[31] if the Minister wished to

[27] *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 (HC) at [60]. It was only because no certificate of substantive assistance was issued to Ridzuan that he was sentenced to death (pending judicial review proceedings).
[28] *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 (CA) at [65].
[29] *Public Prosecutor v Abdul Haleem bin Abdul Karim and another* [2013] 3 SLR 734 (HC) at [1].
[30] *Singapore Parliamentary Debates, Official Report*, vol 89 (12 November 2012, 5.28 pm).
[31] *Singapore Parliamentary Debates, Official Report*, vol 89 (14 November 2012), 45–46, cited *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [63].

express the intention that couriers involved in *incidental* acts of "packing, storing or safekeeping" would be excluded, then he might have said something similar to "they are not *merely* couriers".

This distinction is illustrated by a careful reading of other passages from *Hansard*. While the Minister distinguished between "courier[s] into Singapore" and "suppliers and kingpins outside Singapore",[32] other MPs drew the distinction differently: between "mere drug couriers" and "the drug lords who direct such couriers";[33] "the head men of the drug syndicates" and "those very low on the food chain like the drug couriers";[34] "drug pushers... who might be less culpable drug mules and those who are, in fact, behind the business";[35] and the "very smart people at the helm" of "[d]rug syndicates [which] are sophisticated MNCs" and "people who are willing to act as couriers".[36] These distinctions are based on *position within the drug syndicate* rather than the exact *acts* committed; they call into question whether "courier" was used to mean literally people who transport drugs, or was merely a rhetorical device to distinguish between foot soldiers ("mules") and "kingpins". Therefore, the word "courier" as used in Parliament was not only shorthand; it was shorthand without precise content. Accordingly, the word "courier" is, in the process of statutory interpretation, "just as capable of amplifying rather than clarifying any latent ambiguity",[37] especially since it was understood differently between different MPs (whose views are all relevant to ascertaining legislative intent).[38]

One may reject this argument and say that the Minister's reply, as well as his statement that the accused must "only have been involved as a courier and not in any other type of activity associated with drug supply and distribution",[39] appears to be based on the interpretation of the *ordinary English word* "courier", which indeed does not itself entail activities such as repacking. However, the Court's task is to interpret the *statute*, in which the word "courier" does *not* appear. The significant question is therefore whether someone involved in repacking drugs may be said to fall within any of the criteria in s 33B(2)(*a*). The answer may well be yes: repacking drugs into packets which are to be transported may be "preparatory to or for the purpose of... transporting, sending or delivering" drugs, as it was on the facts in *Abdul Haleem* and *Ridzuan*.

Summary

It is therefore respectfully submitted that the true foundation of s 33B is not the distinction between acts "ancillary" and "incidental" to the *act* of transporting something. Rather,

[32] *Singapore Parliamentary Debates*, *Official Report*, vol 89 (14 November 2012, 2.35 pm).
[33] Associate Professor Eugene Tan, *Singapore Parliamentary Debates*, *Official Report*, vol 89 (12 November 2012, 4.42 pm).
[34] Mr Liang Eng Hwa, *Singapore Parliamentary Debates*, *Official Report*, vol 89 (12 November 2012, 5.12 pm).
[35] Mr Vikram Nair, *Singapore Parliamentary Debates*, *Official Report*, vol 89 (12 November 2012, 5.36 pm).
[36] Mr K Shanmugam, *Singapore Parliamentary Debates*, *Official Report*, vol 89 (14 November 2012, 1.49 pm).
[37] To use a phrase from *Vellama d/o Marie Muthu v Attorney General* [2013] 4 SLR 1 at [66].
[38] On the dangers of focusing only on Parliamentary speeches made by Ministers, see the arguments in Kavanagh, "*Pepper v Hart* and matters of constitutional principle" [2005] LQR 98, *eg* (at 102) that "the judiciary [should not] accept ministerial statements as a proxy for the intention of Parliament as a whole", as applied to s 9A of the Interpretation Act.
[39] *Singapore Parliamentary Debates*, *Official Report*, vol 89 (9 July 2012), 21, cited *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [64].

Hansard suggests that it is based a distinction based on the *position* held by the accused person in the drug syndicate, which forms the *context* of the act he performs. While this is not evident from the face of the statute itself, the same result may be reached through a careful reading of the statute with particular regard to the words "his involvement *in the offence*" (emphasis added) and "any act preparatory to or for the purpose of *his* transporting, sending or delivering a controlled drug" (emphasis added). The Court's answer to Question 3 is therefore, with respect, too broad; one cannot generalise based on the nature of the act committed.

In more concrete terms: It is true that a manufacturer of drugs or a "kingpin" may *also* be involved in packing drugs. But s 33B(2)(*a*)(iii), which covers "any act preparatory to or for the purpose of *his* transporting, sending or delivering a controlled drug" (emphasis added). The manufacturer/kingpin would not be packing the drugs for the purpose of *his* transporting them, but the courier certainly might be. This, together with *Reason 3* above, explains the treatment of Ridzuan's packing and middle-management functions in the syndicate: they were only relevant in proving that Ridzuan was a joint possessor of the drugs[40] and thus were relevant to *his* trafficking the drugs, but were not relevant to the charges he faced. By contrast, if an accused person is truly a "kingpin", then the prosecution can simply charge him with an offence that is not within the scope of s 33B, such as manufacturing or abetting the transportation of drugs.

Commentary on Question 2: May the accused adduce further evidence at the sentencing stage?

Woo and Tay JJ's reservations related to the notion that "an accused person may give evidence about his being a courier at the sentencing stage even though he deliberately withheld such evidence at trial".[41] They took the view that the accused must not be given "a chance to deliberately stifle evidence to gain an advantage and then to speak the truth when that strategy fails".[42]

With respect, this is not necessarily the effect of Chao JA's judgment. Chao JA suggested that the potential problem of the accused contradicting himself or withholding evidence during the trial is merely apparent: in truth, the *evidence* at sentencing, is not to be compared with the *evidence* given at trial, but rather with the *findings* from the trial.[43] Thus, in all likelihood, "any new evidence that goes towards demonstrating the accused person's limited involvement as a courier would not conflict with or undermine the court's conclusion that he knew of the existence of the article containing the controlled drugs".[44] However, for the reasons that follow, it is respectfully submitted that Chao JA could have put the point even more strongly and explicitly.

[40] *Muhammad Ridzuan bin Md Ali v Public Prosecutor and other matters* [2014] 3 SLR 721 (CA) at [62]–[65].
[41] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [77].
[42] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [81].
[43] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [26]–[27].
[44] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [60].

The accused's defence at trial is typically one about his *mens rea* – that he *did not know* of the drugs (or that what he was carrying was drugs) – whereas s 33B is about the *actus reus*. Even if he is held to have been lying (or unable to prove) that he did not *know* about the drugs, it does not follow that he cannot prove that he did not *do* more than transporting (*etc*) the drugs. For example, he might argue that he did not know that a bag he was told to transport contained drugs, but, even if this fails, he might still argue that he had done nothing with the bag except to transport it. Therefore, there is likely to be no question of "giv[ing] the accused person a chance to deliberately stifle evidence":[45] the evidence given at the trial stage is *irrelevant* to the evidence during the sentencing stage.

An analogy may be drawn with partial defences to murder such as diminished responsibility.[46] It is open to a defendant to argue both that he was never at the alleged crime scene and that he had an abnormality of mind: there is *no contradiction* between the two propositions – one is about the *actus reus* and the other is about the *mens rea*.

It is therefore respectfully submitted that Chao JA's conclusion on Question 2 was right, but *not* because he would otherwise "be required to undermine his primary defence... [since] a person must at the very least know of the existence of the article containing the controlled drugs in order to make the claim that he was a courier".[47] This latter statement, which was the crux of Woo and Tay JJ's concerns, may be true of the word "courier", but there is no mention at all of the accused person's *mens rea* in s 33B(2)(*a*), which only contains a list of *acts*. Again, there will simply be no evidence relevant to the sentencing stage that the accused can effectively withhold at the trial stage.

Matters may seemingly be different if the accused denies the *actus reus* at trial, *eg* by claiming that the drugs were not in his possession at all. But even then, s 33B(2)(*a*) requires the accused to prove that his activities were "restricted" – not to prove that he *was* a courier, but rather to prove that he was *no more than* a courier. There is therefore no contradiction between a claim at trial that he was not involved in transporting (*etc*) drugs and a claim during sentencing that he was *also* not involved in arranging sales (*etc*) of the drugs.

Conclusion

The Court of Appeal's judgment has raised many interesting issues. However, there is some potential for confusion: besides the fact that there are two apparently conflicting judgments, as Chao JA observed (and Woo and Tay JJ agreed),[48] "there are questions in this reference which are not altogether necessary. Furthermore, the questions could have been better framed to flesh out the real issues for which clarifications were sought."[49] It is hoped that this note has addressed some of the potential areas of uncertainty.

[45] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [81].
[46] Penal Code (Cap 224, 2008 Rev Ed) s 300, Exception 7.
[47] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [27]–[28].
[48] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [75].
[49] *Public Prosecutor v Chum Tat Suan and another* [2014] SGCA 59 at [69].

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